91-414

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MICHAEL P. MADKOUR,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

William B. Gray, Esq.
Counsel of Record

Sheehey Brue Gray & Furlong
119 South Winooski Avenue
P.O. Box 66
Burlington, VT 05402
Telephone: (802)864-9891

QUESTION PRESENTED FOR REVIEW

Whether Congress intended, and the Fifth and Sixth Amendments to the United States Constitution permit, that a Defendant charged in an indictment with manufacturing and possessing with intent to distribute over 100 marihuana plants in violation of 21 U.S.C. §841 may be sentenced to a mandatory minimum and enhanced maximum sentence without either a jury finding or Rule 11 admission of the quantity of marihuana plants involved in the offense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 930 F.2d 234 (2d Cir. 1991). The opinion of the United States District Court for the District of Vermont is not reported.

JURISDICTION OF THIS COURT

Judgment was affirmed by the United States Court of Appeals for the Second Circuit on April 11, 1991 and on July 9, 1991, Justice Marshall extended the time for filing this petition to and including August 24, 1991. Jurisdiction to review the judgment by writ of certiorari is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V -

No person shall . . . be deprived of life, liberty, or property, without due process of law; . ...

Amendment VI -

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

21 U.S.C. §841.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

* * *

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(B) In the case of a violation of subsection (a) of this section

involving -

* * *

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight.

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years

* * *

STATEMENT OF THE CASE

Pursuant to 18 U.S.C. §3742(a)(1), Defendant Michael P. Madkour appealed to the Second Circuit from the Judgment Including Sentence Under the Sentencing Reform Act entered June 11, 1990, by the United States District Court for the District of Vermont, Hon. Franklin S. Billings, Jr., Chief Judge, because the sentence was imposed in violation of law.

Defendant Madkour was arrested without a warrant on July 8, 1989 and was arraigned before the United States District Court on July 10, 1989. An Indictment was returned on August 4, 1989, charging the Defendant in two counts with the manufacture and possession with intent to manufacture (Count I) and the possession with the intent to distribute (Count II) of a quantity of marihuana, a Schedule I controlled substance. Both counts also contained the additional allegation that Defendant "was growing over 100 marihuana plants on National Forest Service land near Lincoln, Vermont," making the Defendant subject to the enhanced penalties prescribed in 21 U.S.C.

841(b)(1)(B)(vii), including a 5-year mandatory minimum term of imprisonment. Defendant pleaded not guilty to the indictment on August 9, 1989.

Before trial, Defendant requested that the Court rule that the jury was required to find beyond a reasonable doubt -- and would be so instructed -- that the charged offenses were ones "involving 100 or more marihuana plants," as alleged in the indictment and specified in the statute. The Court denied the Defendant's motion, ruling that the number of plants is solely an issue "to be determined by the Judge at the time of sentencing." Accordingly, the Court ruled that it would not instruct the jury to determine whether the offenses involved more than 100 plants and would not permit proof and argument on that issue at trial.

Defendant's counsel thereupon stated that if the number of marihuana plants was not an issue for the jury, there was nothing left for determination at trial and a plea of guilty would be offered which expressly denied that 100 or more marihuana plants were involved in the offenses. Defendant's counsel made

clear that Defendant would argue at sentencing that the court did not have the power to impose the mandatory minimum 5-year sentence under §841(b)(1)(B)(vii), because the Court had refused to permit a jury determination, and the Defendant had not admitted in the context of a plea of guilty, that more than 100 marihuana plants were involved in the offenses. Defendant also indicated that an appeal would be taken pursuant to 18 U.S.C. §3742 from the imposition of any mandatory minimum sentence based on the amount of marihuana involved. The Defendant thereupon offered -- and the Court accepted -- a plea of guilty to both counts, which expressly denied that the offenses involved 100 or more marihuana plants. In accepting the plea, the Court acknowledged that the number of plants was an issue to be dealt with at sentencing and "at a higher level."

A pre-sentence report was prepared and, because Defendant contested the number of plants involved in the offenses, an evidentiary hearing was held on April 23, 1990. On May 15, 1990, the Court

found by a preponderance of evidence that 131 marihuana plants were involved in the offense of manufacture of marihuana charged in Count I. The Court made no finding of the number of plants involved with the possession with intent to distribute charged in Count II.

On June 11, 1990, at sentencing, the Court denounced as a "grave miscarriage of justice," the mandatory minimum sentence it found itself required to impose by virtue of 21 U.S.C. §841(b)(1)(B)(vii), but sentenced the Defendant to a term of imprisonment for 60 months and a term of supervised release of 4 years. The Court indicated that, except for the mandatory minimum requirement, the Court would have sentenced the Defendant to 15 months, the low end of the guideline range. The sentence was imposed on the indictment as a whole without reference to any particular count.

ARGUMENT

Introduction

The five year mandatory minimum sentence imposed by the United States District Court on Michael Madkour, a 27-year-old college graduate with no criminal record, accused by the Government of growing 131 immature marihuana plants, was characterized by the sentencing judge as a "grave miscarriage of justice. . .." (A. 16). The Second Circuit was similarly troubled by the harsh sentence but determined, erroneously, that it must affirm in an opinion which held that Madkour was not entitled to a jury finding, beyond a reasonable doubt, that his crime involved a quantity of marihuana in excess of the amount required by the statute. The Second Circuit decided these important Fifth and Sixth Amendment questions in a way which conflicts with the reasoning of this Court in McMillan v. Pennsylvania, 477 U.S. 79 (1968), and which creates a discretionary right to a jury determination on such issues in the Second Circuit

in conflict with a decision of the Sixth Circuit, among others, which mandates that the quantity determinations under 21 U.S.C. §841(b) be made solely by the sentencing judge using a preponderance standard. Hundreds, perhaps thousands, of defendants are being sentenced in this manner every year in the courts of the United States and an early resolution by this Court of the issues raised herein will provide badly needed guidance to Courts and practitioners and avoid judicial chaos later.

Statutory Offense Conduct v.
Sentencing Guideline Factors

The Second Circuit, as well as other Circuit Courts which have held that quantity issues under 21 U.S.C. §841 are for the sentencing judge not the jury, all make the same fundamental error: they follow "[t]he general principle that at sentencing the district court is not limited to conclusions reached by the jury or even evidence presented at trial ... [and] the well-established standards for sentencing guideline cases,

under which this case falls." 930 F.2d at 237-38.

The quantity of marihuana which triggers the increased minimum and maximum sentences under 21 U.S.C. §841 is not a sentencing factor under general principles or under the sentencing guidelines which guides the Court to a given range of results. It is an element defined in the offense statute itself which mandates the imposition of a minimum sentence and increases the maximum sentence, and from which there can be no downward departures, however well justified, as permitted by general sentencing principles and the sentencing guidelines. Quantity issues specified in 21 U.S.C. §841 are aggravation factors indistinguishable from quantity issues specified in 18 U.S.C. §641 (theft of government property valued at $100.00 or less, a misdemeanor punishable by imprisonment for one year; if property valued at more than $100.00, imprisonment for 10 years); 18 U.S.C. §655 (theft by a bank examiner of $100.00 or less - one year; over $100, five years); 18 U.S.C. §656 (bank embezzlement of $100.00 or less, punishable by

imprisonment for one year; over $100.00, by five years); 18 U.S.C. §657 (theft from a credit institution - same as §656); 18 U.S.C. §659 (theft from interstate shipment - same as §656).

The same kind of jury differentiations in severity of offense are present in 18 U.S.C. §201 (payments to officials with intent to influence actions punishable by 15 years; payments as gratuities - two years); 18 U.S.C. §2113 (bank robbery, punishable by 20 years imprisonment or if weapon is used, 25 years). Aggravating factors specified in federal offense statutes have always been treated as jury questions and research has revealed no case adequately justifying different treatment of the aggravating factors specified in 21 U.S.C. §841. And the Second Circuit is clearly in error when it concludes, without analysis, that this is just another case falling under general sentencing principles and the sentencing guidelines.

The Decision Below Conflicts With The Reasoning Of This Court In McMillan v. Pennsylvania

The decision below conflicts with the reasoning of this Court in McMillan v. Pennsylvania.

The Second Circuit cited McMillan v. Pennsylvania, 477 U.S. 79 (1986), to support the unexceptional assertion that the "preponderance standard [regarding disputed sentencing factors] was held to satisfy due process in state sentencing proceedings." (A. 10). The Second Circuit ignored the reasoning of this Court in McMillan for determining whether aggravating factors defined by statutes -- in Madkour's case by the offense statute -- are sentencing factors or whether they are issues which must be decided by the juror.

In McMillan, this Court reviewed a Pennsylvania statute, which specified that visible possession of a firearm during commission of several enumerated and previously enacted violent felonies mandated a minimum sentence of five years'

confinement. The statute did not increase the maximum penalty of those felonies.

There were two factors present in McMillan, and critical to this Court's approval of the Pennsylvania Mandatory Minimum Sentencing Act, which are lacking in the instant case and under 21 U.S.C. §841(b): the clarity of legislative intent and the absence of an increase in the maximum penalty which could be imposed on a defendant.

The Pennsylvania Mandatory Minimum Sentencing Act specified that:

> "Provisions of this section shall not be an element of the crime ... [and the] applicability of this section shall be determined [by the judge] at sentencing ... by a preponderance of the evidence."

McMillan, 477 U.S. at 81 n. 1.

The Court, noting that "we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states," 477 U.S. at 85, stressed that in determining what facts must be proved beyond a reasonable doubt, and to a jury,

477 U.S. at 93, "the state legislature's definition of the elements of the offense is usually dispositive." 477 U.S. at 85. In contrast to the Pennsylvania statute, not a single word of 21 U.S.C. §841, nor a shred of legislative history, even suggests that Congress intended to deprive defendants of the protections of jury determinations beyond a reasonable doubt in §841(b) quantity determinations.

The argument that §841(b) does not add elements to the §841(a) offenses is usually based on the structure of the section. But when a defendant's right to a jury determination beyond a reasonable doubt is affected, such a flimsy basis does not support the McMillan requirement that a legislature's intent be "expressly provided" (emphasis added). 477 U.S. at 85.

Indeed, the structure of 21 U.S.C. §841, which defines the basic offense in subsection (a) and describes aggravating factors in subsection (b) is structurally indistinguishable from the federal bank-robbery statute, 18 U.S.C. §2113, which defines the basic offense in subsection (a) and the aggravating

factor of a dangerous weapon in subsection (d). This Court, in McMillan, specifically noted that 18 U.S.C. §2113 which provides separate and greater punishment for bank robberies accomplishes through "use of a dangerous weapon or device" was distinguishable from the Pennsylvania statute and presented arguments of "at least more superficial appeal." 477 U.S. at 88.

The Supreme Court in McMillan based its decision on the fact that the Pennsylvania Mandatory Minimum Sentencing Act did not increase the maximum penalty but only limited the sentencing court's discretion by "raising the minimum sentence that may be imposed..." 477 U.S. at 89.

Here, Madkour's maximum penalty was increased by virtue of the quantity determination made by a preponderance of evidence at the sentencing hearing, from 5 to 40 years, the maximum fine from $250,000 to $2,000,000 and the term of supervised release from two years to at least four. Because he was sentenced to five years plus a supervised term of four years, (A. 16), Michael Madkour is in fact serving

a sentence which exceeds the maximum which existed without the unconstitutional quantity determination.

Such an increase in penalty is not authorized by McMillan and is contrary to the holding in Specht v Patterson, 386 U.S. 605 (1967), cited with approval in McMillan, 477 U.S. at 88.

Comparison To Other Graded Federal Crimes

The Second Circuit has ignored significant relevant comparisons with existing federal crimes. As noted above, the federal criminal statutes have always included graded offenses where the basic charge is treated as a lesser included offense within the enhanced charge. Courts have always allowed the aggravating factor, such as quantity (18 U.S.C. §657) or use of a weapon (18 U.S.C. §2113(d)), to be determined by the jury as part of the trial.

Because there is no significant difference between the structure and content of 21 U.S.C. §841(b) and that of 18 U.S.C. §2113(d) both describe

the penalty for an aggravated form of the offense described in subsection (a), there is no justification for denying the protections of a jury trial under one and providing it under the other. There is also no basis for concluding that Congress intended a different result in each case. See also United States v. Alvarez, 735 F.2d 461, 467 (11th Cir. 1984) (comparison of the value determinations under 18 U.S.C. §659 and 641 with 21 U.S.C. §841).

When Congress wished to have an aggravating factor decided by a judge and not a jury, they made it explicit in 18 U.S.C. §3575, now repealed, Congress provided increased sentences for dangerous special offenders. The statute specifically states: (1) that in no case shall the determination be made by a jury; (2) that the determination shall be made as part of the sentencing by the judge; and (3) that the determination shall be made by a "preponderance of the information."

The clarity present in 18 U.S.C. §3575 resembles that in the statute approved in McMillan

and is totally lacking in 21 U.S.C. §841.

Comparisons To Traditional Sentencing Practices And Current Sentencing Under The Guidelines.

Sentencing judges have always had broad latitude in making assessments at the time of sentencing regarding the character, background and conduct of defendants, but that latitude has never, in federal courts at least, permitted the sentencing judge to increase the maximum penalty faced by the defendant without a jury determination of the critical fact. Sentencing judges have always been required to exercise their discretion within limits established by the jury verdict.

Moreover, while a federal sentencing judge historically retained the power to sentence someone like Michael Madkour to five years' imprisonment for growing marihuana, if the Court determined that the facts warranted such a sentence, never before did the law mandate imposition of that sentence, contrary to

the court's best judgment, and based solely on facts found by the Court, without a jury, using a preponderance of the evidence standard. While it may be appropriate, following a jury verdict rendered beyond a reasonable doubt, to deny discretion to the sentencing judge to impose a sentence less than five years, to do so based on non-jury preponderance determinations is offensive to our sense of fairness, due process and the historical importance of a jury of our peers.

The sentencing procedures under §841 approved by the Second Circuit raise the spectre of a police state where juries decide little more than the relationship of the defendant to a drug offense and the remaining facts are left to the judge at sentencing. On a similar issue, Justice Powell, dissenting in Patterson v. New York, 432 U.S. 197, 224 n. 8 (1977), foresaw the risk that a state might someday define murder as "mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove

that he acted without culpable measure." See also McMillan v. Pennsylvania, 477 U.S. at 101 (Stevens, dissenting).

While the burden of proof under §841(b) has not yet been shifted, it has been substantially diminished. In the instant case, many of the facts found by the sentencing judge by a preponderance might never have persuaded a jury beyond a reasonable doubt.

Finally, it does not undermine judicial efficiency to have a §841(b) quantity determination made by the jury at trial. In the instant case, the sentencing hearing, itself, consumed part of two days. It is unlikely that the trial would have taken much longer than that and there would have been no need for a sentencing hearing.

Neither the statute nor the case law justifies depriving a defendant of a jury determination beyond a reasonable doubt on the quantity determinations required under §841(b) and this Court should require either a jury finding or a Rule 11 admission at a plea

of guilty, before a sentencing judge makes a quantity determination which enhances the defendant's sentence under §841(b). Because there was no jury determination or admission in the instant case, Michael Madkour's sentence is unlawful.

Allowing A Jury Determination Of §841 Aggravating Factors For Some Defendants And Not For Others Is Fundamentally Unfair And Violates Equal Protection.

The Second Circuit in Madkour interpreted its prior decisions in United States v. Pforzheimer, 826 F.2d 200 (2d Cir. 1987), to mean that "the issue of quantity [under 21 U.S.C. §841] may be submitted to the jury, but that a district judge is not obligated to do so. The decision to use the interrogatories to determine quantity --- lies in the discretion of the district judge." 930 F.2d at 237.

Clearly, it is fundamentally unfair for the law to give some defendants a jury trial on quantity issues and to deny it to others, based solely on the whim of

the trial judge, yet that is the law in the Second Circuit. In the Sixth Circuit, no jury findings on quantity issues are permitted and the sentencing judge is obligated to ignore and such jury findings which have been made. United States v. Moreno, 899 F.2d 465, 473 (6th Cir. 1990). In the Eleventh Circuit, a quantity determination under 21 U.S.C. §841 is "a critical element of the offense" and must be alleged in the indictment. United States v. Alvarez, 735 F.2d 461 (11th Cir. 1984).

Among the circuits then, there are significant conflicts, and this Court's resolution of those conflicts will greatly aid the administration of justice.

Quantity Issues Are Appropriate For Jury Determinations.

Quantity determinations under §841 involve assessments of credibility, skill, and accuracy of witnesses, usually DEA agents. They also involve issues of defendant's intent. For example, the undisputed evidence at sentencing established that

Michael Madkour intended to discard one-half of the plants (the males) and to keep for himself most of the remaining female plants. Charged with possession with intent to distribute, Madkour's intent regarding distribution, was central to the determination of the number of plants involved in the offense, the statutory factor which aggravated his sentence. Similar arguments are available for the charge of manufacture and possession with intent to manufacture. Yet, the sentencing judge made the determinations using a preponderance standard (A. 16).

CONCLUSION

The writ should be granted to review these important constitutional and federal issues, to ensure consonance with other decisions of this Court and to resolve conflicts among the Circuits.

Respectfully submitted at Burlington, Vermont, this 23rd day of August, 1991.

William B. Gray
Counsel of Record

Sheehey Brue Gray & Furlong
119 South Winooski Avenue
P.O. Box 66
Burlington, VT 05402
Telephone: (802)864-9891

Attorneys for Petitioner,
Michael P. Madkour

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 575—August Term 1990

Argued: December 20, 1990 Decided: April 11, 1991

Docket No. 90-1397

UNITED STATES OF AMERICA,

Appellee,

—against—

MICHAEL P. MADKOUR,

Defendant-Appellant.

Before:

TIMBERS, MESKILL, and PRATT,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Vermont, Franklin S. Billings, Jr., *Judge*, convicting the defendant of violating 21 U.S.C. § 841(a)(1), and sentencing him to the mandatory five-year minimum sentence required by § 841(b)(1)(B).

Affirmed.

CHARLES A. CARUSO, Burlington, VT
Assistant United States Attorney (George J. Terwilliger, III, United States Attorney, David V. Kirby, Chief, Criminal Division, William B. Darrow, Assistant United States Attorney, of Counsel), *for Appellee*.

WILLIAM B. GRAY, Burlington, VT (Sheehey Brue Gray & Furlong, Donald J. Rendall, Jr., of Counsel), *for Defendant-Appellant*.

PRATT, *Circuit Judge*:

Michael P. Madkour appeals his sentence following his guilty plea to knowingly and intentionally manufacturing and possessing with intent to manufacture marijuana in violation of 21 U.S.C. § 841(a)(1). Madkour was sentenced for possessing in excess of 100 marijuana plants, an amount that triggers a five-year minimum sentence under the section's penalty provision, § 841(b)(1)(B)(vii). This statutory minimum is one of a number of minimum sentences imposed by congress as part of the Comprehensive Drug Abuse Prevention and Control Act. Had this statutory minimum not existed, Madkour's sentence under the sentencing guidelines would have been between 15 and 21 months. Thus, it is not surprising that there was great contention over the actual number of plants for which Madkour was responsible. In fact, it was the only disputed issue before the district court.

Madkour argues principally that his mandatory minimum sentence cannot be imposed without a jury finding

as to the amount of the drugs. He also argues that the district court failed to insulate suppressed evidence from its sentencing determination, and that the court's finding as to the number of plants was clearly erroneous. For the reasons below, we reject these arguments and affirm the judgment of conviction.

BACKGROUND

In June of 1989 an employee of the United States Forest Service discovered bags of Promix, a type of potting soil commonly used to grow marijuana, in Green Mountain Forest, a national forest located near Lincoln, Vermont. The employee notified the local sheriff's office, which, upon investigation of the area, discovered approximately 84 marijuana plants. The sheriff's office contacted agents from the Drug Enforcement Administration, and together the two offices investigated more extensively. They first found 28 additional plants, and then discovered a second site that contained 26 plants.

The agents placed the area under surveillance, and on July 8th, they arrested defendant Michael P. Madkour after they observed him at the first site, dispersing plants into a wooded area nearby. Madkour was charged in two counts with manufacturing and possessing with intent to manufacture marijuana (count one), and with possessing with intent to distribute marijuana (count two). Both counts alleged that he did so by "growing over 100 marijuana plants on National Forest Service Land near Lincoln, Vermont."

Prior to trial, Madkour moved to suppress statements he had made to the agents immediately following his arrest. After a hearing, the district court suppressed

some of his statements, but rejected Madkour's argument that all of his statements should be suppressed.

Madkour then moved for a pretrial ruling that the number of marijuana plants be submitted to the jury as one of the elements of each offense. Under the applicable sentencing provision, 21 U.S.C. § 841(b)(1)(B)(vii), a finding that the defendant possessed in excess of 100 plants would require imposition of a mandatory minimum sentence of five years. Madkour argued that quantity was part of the substantive offense under § 841, and furthermore, since the quantity was the only disputed issue in the case and a finding that there were in excess of 100 marijuana plants would more than double his sentence, the issue must be submitted to a jury for determination. The district court denied Madkour's motion, concluding that the number of plants "is not an element of the offense * * * [rather] the amount goes to the penalty."

Faced with this ruling, Madkour pled guilty, but during his allocution refused to admit that the two counts with which he was charged involved 100 or more plants. Since the district judge had already determined that the number of plants was not an element of the offense, but rather was a matter to be considered by the court as part of the sentencing proceeding, he accepted Madkour's plea.

When the time came for sentencing, on defendant's motion the district court held an evidentiary hearing to determine the number of marijuana plants involved in the offenses. The government claimed that there were 131 plants, while Madkour asserted that only 65 to 70 plants were involved. Ultimately, the district court found, by a preponderance of the evidence, that 131

marijuana plants were involved. Given that fact, the district judge had no alternative but to sentence Madkour to the statutory minimum of five years, although he did so with great reluctance. Referring to the mandatory sentence requirement, he wrote:

> This type of statute [§ 841(b)(1)(B)(vii)] does not render justice. This type of statute denies the judges of this court, and of all courts, the right to bring their conscience, experience, discretion, and sense of what is just into the sentencing procedure, and it, in effect, makes a judge a computer, automatically imposing sentences without regard to what is right and just. It violates the rights of the judiciary and of the defendants, and jeopardizes the judicial system. In effect, what it does is it gives not only Congress, but also the prosecutor, the right to do the sentencing, which I believe is unconstitutional. Unfortunately, the higher courts have ruled it to be constitutional. * * * This case graphically illustrates the failure of the justice system. * * * But for the mandatory sentence, I would have sentenced defendant to the [guideline] minimum of 15 months.

Madkour appeals.

DISCUSSION

1. *Appealability.*

As a preliminary matter, we address the government's contention that because Madkour pled guilty, he has waived his right to appeal all questions involving the quantity of drugs. In support of its position, the government points to our recent decision in *United States v.*

Contractor, Nos. 89-1587, 89-1026, 89-1071, slip op. at 1889 (2d Cir. February 11, 1991). In *Contractor*, the defendant pled guilty to the charge of conspiring to import heroin. Prior to the plea, the district court had indicated that it would not allow the defendant to introduce at trial evidence that he was "authorized" by the Drug Enforcement Administration to engage in the criminal activity with which he was charged. *Id.* at 1898. We held that by pleading guilty to the substantive crime, the defendant had waived his right to appeal the district court's preclusion of the "authorization" defense. *Id.*

The government would have us apply the same rule in the present case. However, there are two significant differences. First, the issue that Madkour now raises concerns his sentence, and not, as in *Contractor*, a defense to the crime itself. Second, Madkour, unlike the defendant in *Contractor*, distinctly preserved the issue he now raises on appeal by informing the court, prior to sentencing, that he intended to appeal the issue. As even a cursory glance at our docket reveals, sentencing disputes under the guidelines may be appealed, *see* 18 U.S.C. 3742(a) & (b), as long as the defendant "first present[s] * * * [his argument] to the district court for determination." *United States v. Irabor*, 894 F.2d 554, 555 (2d Cir. 1990). The same rule applies to claims of improper application of mandatory minimum sentences, for such sentences are applied under, not outside of, the sentencing guidelines. *See* U.S.S.G. § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence *shall be the guideline sentence*.") (emphasis added). *Cf.* U.S.S.G. § 5G1.1(a) (incorporating statutory maximum sentences as guidelines sentences); *see also United States v. Larotonda*,

No. 90-1486, slip op. 2565, 2567 (2d Cir. March 11, 1991) (per curiam) ("The Guidelines provide that if there is a discrepancy between the Guidelines range and a minimum prison term provided by statute, the statutory provision controls").

2. *Standard of Proof.*

Madkour contends that the district court cannot impose a mandatory minimum sentence under § 841(b) without a jury finding, beyond a reasonable doubt, that the crime involved a quantity of drugs in excess of the amount required by the statute. He has abandoned his claim that the quantity of drugs is an element of the offense, acknowledging that the circuit rejected this argument in *United States v. Campuzano*, 905 F.2d 677 (2d Cir.), *cert. denied*, 111 S. Ct. 363 (1990), which was decided by us just one day before Madkour was sentenced in the district court. But Madkour does maintain that *Campuzano* left open the question of whether a quantity issue under § 841 requires a jury trial, and he further argues that language in *United States v. Pforzheimer*, 826 F.2d 200 (2d Cir. 1987), suggests that in a case involving § 841, quantity should be determined by the jury. We reject this argument.

In *Campuzano*, we explicitly addressed the relationship between quantity of drugs and the substantive offense under § 841. Following "a clear majority of circuits" we held that, even in the face of a specific allegation of quantity in the indictment, "quantity is not an element of the crimes proscribed by Section[ ] 841(a) * * *." *Campuzano*, 905 F.2d at 679 (citations omitted). We stated that "[w]hen an indictment does allege that a particular quantity is involved, the effect is only

to put the defendant on notice that the enhanced penalty provisions of Section 841(b) may apply." *Id.*

In short, quantity relates solely to sentencing. And at sentencing, the district court is not limited to conclusions reached by the jury or even evidence presented at trial, but instead may consider any evidence that it deems appropriate. *See Hollis v. Smith*, 571 F.2d 685, 693 (2d Cir. 1978) (Friendly, J.) ("There is no authority binding upon us which holds that the procedure in proceedings relating solely to punishment, even when an additional fact has to be established, must conform precisely to those in proceedings relating to guilt, and we see no basis in principle for so holding.")

In an attempt to counter our holding in *Campuzano* and the ramifications that result from it, Madkour points to language in *Pforzheimer*, a case in which we affirmed the district court's decision to use jury interrogatories in a case under § 841. One of those interrogatories addressed the issue of quantity, and in justifying the use of the interrogatories in general, we stated, in dictum, that " 'there was no way' for the judge to know whether * * * [defendant] Pforzheimer had manufactured more or fewer than 50 kilograms of marijuana unless the question was asked specifically." *Pforzheimer*, 826 F.2d at 206 (citation omitted). But the issue in *Pforzheimer* was not whether quantity determinations were a jury question, but rather whether it was proper for the district court to have used jury interrogatories at all. We stated that because the case involved multiple counts and two defendants—one of whom was acquitted on all counts—the use of the interrogatories was proper. The issues of who should decide the quantity of drugs in cases under § 841, and what standard of

proof should be applied, were never directly raised. Accordingly, we interpret the dictum in *Pforzheimer* to which Madkour points as determining that the issue of quantity *may* be submitted to the jury, but that a district judge is not obligated to do so. The decision to use interrogatories to determine quantity, as with their use in general, lies in the discretion of the district judge.

The general principle that at sentencing the district court is not limited to conclusions reached by the jury or even evidence presented at trial is further confirmed by the well-established standards for sentencing guideline cases, under which this case falls. Judge McLaughlin of this court has recently summarized these standards in *United States v. Ibanez*, 924 F.2d 427 (2d Cir. 1991).

> Under the Guidelines, "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor." U.S.S.G. § 6A1.3(a). The information then presented to the court need only have "sufficient indicia of reliability to support its probable accuracy" without regard to admissibility under the rules of evidence. *Id.*; *see also* Commentary to § 6A1.3; *United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989); *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980).
>
> Defendants are entitled to due process up to and through the imposition of sentence. *United States v. Pugliese*, 805 F.2d 1117, 1122 (2d Cir. 1986) (citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977)), *cert. denied*, 489 U.S. 1067 (1989). Disputed sentencing

> factors, however, need only be proved by a preponderance of the evidence to satisfy due process. *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 182 (2d Cir.), *cert. denied*, 111 S. Ct. 127 (1990); *United States v. Rivalta*, 892 F.2d 223, 230 (2d Cir. 1989); *United States v. Guerra*, 888 F.2d 247, 251 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1833 (1990); see *McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986) (preponderance standard held to satisfy due process in state sentencing proceeding).
>
> On appeal, the reviewing court must "accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e); *see United States v. Santiago*, 906 F.2d 867, 871 (2d Cir. 1990); *United States v. Parker*, 903 F.2d 91, 103 (2d Cir.), *cert. denied*, 111 S. Ct. 196 (1990); *United States v. Shoulberg*, 895 F.2d 882, 884 (2d Cir. 1990); *see also United States v. Lanese*, 890 F.2d 1284, 1291 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2207 (1990). We will not overturn the district court's application of the Guidelines to the facts absent an abuse of discretion. *Santiago*, 906 F.2d at 871; *Parker*, 903 F.2d at 103; *Shoulberg*, 895 F.2d at 884.

Id. at 429-30.

Accordingly, the district judge did not abuse his discretion in denying Madkour's motion and in determining, himself, the quantity of plants by a preponderance of the evidence after a sentencing hearing. His conclusion that Madkour possessed in excess of 100 plants was not clearly erroneous.

3. *Suppressed Statements and the Sentencing Hearing.*

Madkour also argues that the district court failed to "preclude the possibility" that his testimony at the suppression hearing "influenced the court's determination of the number of plants involved" and he urges that the case should be remanded to ensure that it is "in full compliance" with *Simmons v. United States*, 390 U.S. 377 (1968).

Simmons is inapposite: in that case, the Supreme Court held that use *at trial* of testimony at a suppression hearing violated the fourth amendment. *Id.* at 389-90. Madkour claims that this rationale "applies with equal force to a sentencing proceeding." But in support of his statement, Madkour only offers *United States v. Branker*, 418 F.2d 378, 380-81 (2d Cir. 1969), a case that applied *Simmons* to a pre-trial hearing. He offers no support for his assertion that the case should apply to a sentencing hearing.

There are additional reasons why this claim of Madkour's has no merit. To begin with, at the sentencing hearing the district court stated that "we take the evidence as presented at *this* hearing. And, obviously, the evidence and our findings under the suppression hearing is not part of *this* hearing." (emphasis added). Given this statement, it seems clear that in making his quantity determination, the district judge did not rely upon any evidence that was presented at the suppression hearing. Thus the factual premise for Madkour's argument is false.

Moreover, even if the district judge had relied on evidence developed at the suppression hearing, it would not have been error. *See* 18 U.S.C. 3661 ("No limitation

shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). In addition, we have recently held that "[t]he Due Process Clause does not restrict the court with respect to the type of information it may consider for purposes of sentencing." *United States v. Copeland*, 902 F.2d 1046, 1050 (2d Cir. 1990). In *Copeland*, we upheld a district court's consideration, in a sentencing hearing, of a quantity of drugs that the defendant had not even been charged with in the indictment. *Id.* at 1050.

Finally, we have held that "[w]here illegally seized evidence is reliable and it is clear * * * that it was not gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence." *United States v. Schipani*, 435 F.2d 26, 28 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971). *See also United States v. Hernandez Camacho*, 779 F.2d 227, 230-32 (5th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986).

4. *Proof of Marijuana.*

Madkour's last contention is that the district court's finding as to the number of marijuana plants was clearly erroneous, because the government actually tested only a small number of the plants for the presence of THC. Madkour contends that if plants do not contain THC, then they are not marijuana as defined by the statute, and that because the government did not individually test each of the marijuana plants for THC, there was inadequate evidence for the district court's

finding that Madkour possessed in excess of 100 plants. We reject this argument.

21 U.S.C. § 802(16) defines marijuana as "[a]ll parts of the plant *Cannabis sativa L.*, whether growing or not * * *." In interpreting § 841, we have held that "Congress intended to prohibit possession of all varieties of marijuana." *United States v. Kinsey*, 505 F.2d 1354 (2d Cir. 1974). In the present case, the government discovered approximately 131 marijuana plants: In addition to the lab results of the tests for THC in a random sample of the plants, the government also offered the expert testimony of an experienced government agent, who testified that a visual inspection of the plants led him to conclude that they were marijuana. This was sufficient for the district court to conclude that all of the plants were marijuana, a conclusion that was not clearly erroneous. *Cf. United States v. Rodriguez-Arevalo*, 734 F.2d 612, 616 (11th Cir. 1984) ("The nature of a substance as marijuana need not be proved by direct evidence where circumstantial evidence establishes beyond a reasonable doubt its identity.").

CONCLUSION

The judgment of conviction is affirmed in all respects. Upon finding that Madkour possessed in excess of 100 marijuana plants, the district judge was compelled to sentence him to at least a five-year prison sentence. The irony of a mandated sentence, in the face of our long tradition that trumpets the importance of judicial discretion in sentencing, is not lost on us. The district judge was troubled by the harsh sentence that he was compelled to impose on Madkour, following a process that,

in his words, "makes a judge a computer, automatically imposing sentences without regard to what is right and just." We too are troubled, but unfortunately, have no power to disregard the clear mandate of congress, however ill-advised we might think it to be.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
	:	Criminal
v.	:	89-59-01
	:	
MICHAEL P. MADKOUR	:	

STATEMENT OF REASONS FOR SENTENCE

The court finds as follows in this case:

1. The offense of possession with intent to distribute marijuana occurred in 1989. Therefore, Guideline 2D1.1(3) applies in this case. Inasmuch as more than 100 plants were involved in the offense conduct, the base offense level is 16.

2. The defendant has indicated a clear recognition and affirmative acceptance of personal responsibility for his criminal conduct and as a result the offense level is reduced by 2,

guideline 3E1.1(a).

3. The defendant has no prior criminal convictions, and thus is in criminal history category I.

4. The guideline range for imprisonment for offense level 14 and criminal history category I is from 15 to 21 months. In this case, however, the defendant was convicted of violating 21 U.S.C. §841(b)(1)(B), which carries a mandatory minimum term of 5 years imprisonment and 4 years supervised release.

This case and the sentence therein cries out for justice. We think there is an unjust effect in connection with the mandatory sentencing enacted by the Congress covering this matter. The Act requires that if the prosecutor in his discretion alleges, and you are found to have been involved with 100 or more plants, that the court must impose the minimum sentence, and we have no discretion whatsoever. This case illustrates the grave miscarriage of justice that results from this type of statute and this type of

prosecution.

This type of statute does not render justice. This type of statute denies the judges of this court, and of all courts, the right to bring their conscience, experience, discretion, and sense of what is just into the sentencing procedure, and it, in effect, makes a judge a computer, automatically imposing sentences without regard to what is right and just. It violates the rights of the judiciary and of the defendants, and jeopardizes the judicial system. In effect, what is does is it gives not only the Congress, but also the prosecutor, the right to do the sentencing, which I believe is unconstitutional. Unfortunately, the higher courts have ruled it to be constitutional.

I am obviously required to follow the law, but the rule of law presupposes that it will serve justice. The mandatory minimum sentences do not serve justice, and should be repealed. This case graphically illustrates the failure of the justice system.

Where a statutorily required minimum sentence is greater than the maximum of the applicable

guideline range, the statutorily required minimum sentence shall be the guideline sentence, 5G1.1.(b). Thus, the guideline sentence in this case is 60 months. But for the mandatory sentence, I would have sentenced defendant to the minimum of 15 months.

5. The defendant is hereby committed to the custody of the Bureau of Prisons for a term of imprisonment of 60 months, to be followed by a term of supervised release of 4 years, subject only to the following conditions:
   a. That he not commit any crimes, Federal, state or local.
   b. That he not possess any illegal controlled substances.
6. The guideline fine range in this case is from $4,000 to $2,000,000, plus the costs of confinement and supervision. The defendant does not have the ability to pay a fine. Therefore, all fines are waived in this case.
7. A special assessment of $100, payable immediately is hereby imposed.

The defendant is to surrender to the institution designated by the Bureau of Prisons not later than 2 p.m., on July 10, 1990. I recommend that the sentence be served at a minimum security facility.

Both the defendant and the government may have the right to appeal this sentence, as set forth in Title 18 U.S.C. §3742. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

Dated at Rutland in the District of Vermont this 12th day of June, 1990.

/s/ Franklin S. Billings, Jr.
Chief Judge